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Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1995

INGALLS SHIPBUILDING, INC. AND AMERICAN
MUTUAL LIABILITY INSURANCE COMPANY, IN
LIQUIDATION, BY AND THROUGH THE MISSISSIPPI
INSURANCE GUARANTY ASSOCIATION,

Petitioners,

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, U. S. DEPARTMENT OF LABOR,
AND MAGGIE YATES (Widow of Jefferson Yates),

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF OF PETITIONERS

RICHARD P. SALLOUM
Counsel of Record
PAUL B. HOWELL
FRANKE, RAINEY &
SALLOUM, PLLC
Attorneys at Law
Post Office Drawer 460
2605 Fourteenth Street
Gulfport, MS 39502-0460
601-868-7070

Counsel for Petitioners

WILLIAM J. POWERS, JR.
Vice President and
General Counsel
GEORGE M. SIMMERMAN, JR.
Assistant General Counsel
Ingalls Shipbuilding, Inc.
Post Office Box 149
Pascagoula, MS
39568-0149
601-935-3912

Of Counsel for Petitioners

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REPLY BRIEF OF PETITIONERS

COME NOW, the Petitioners, Ingalls Shipbuilding, Inc., and American Mutual Liability Insurance Company, in liquidation, by and through the Mississippi Insurance Guaranty Association, and pursuant to Supreme Court Rules 15.6 and 17.5, file this their reply to the briefs in opposition to their Petition for Writ of Certiorari. Briefs in opposition have been filed by both Maggie Yates and the Director of the Office of Workers' Compensation Programs, U.S. Department of Labor (hereinafter Director), although the Director agrees with the Petitioners that a writ of certiorari should issue as to the first issue raised by Petitioners.

1. 33(g)

The first issue raised by Petitioners is that certiorari should be granted to resolve the conflict between the Fifth and Ninth Circuits regarding whether § 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 933(g), should operate to bar the death claim of a widow who settled her potential third party wrongful death case prior to the death of her husband without the employer's consent.

The Brief for the Director agrees with Petitioners that certiorari should be granted on this issue to resolve the conflict between the Fifth Circuit's decision in the instant claim and the Ninth Circuit's decision in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 2705 (1994). The Director also correctly notes that this Court's resolution of the issue could potentially affect thousands of workers' compensation claims against Ingalls Shipbuilding, Inc., alone. (Brief at p. 10) [See *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 131 n.2 (5th Cir. 1994).]

The Brief in Opposition of Respondent Maggie Yates also acknowledges that the decision in the instant claim

creates a conflict between the Fifth and Ninth Circuits, which is not "unimportant." (See Brief at pp. 10-11.) However, she suggests that conflicts between additional circuits should be allowed to arise before this Court exercises its jurisdiction. However, the Brief of the private Respondent fails to consider the immediate impact this Court's decision would have on the large number of similar LHWCA claims and it fails to consider that the majority of Longshore cases are seemingly resolved in the Fifth and Ninth Circuits.

Maggie Yates' Brief in Opposition also suggests that the employer is not prejudiced by the actions of Mrs. Yates prior to her husband's death in releasing third party defendants in exchange for inadequate settlement proceeds, since the employer has an independent cause of action against the third party defendants which caused its damages pursuant to *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969). However, the widow's brief does not dispute that the Petitioners would be forever barred from seeking subrogation against the third party defendants because of the widow's unauthorized settlements and release. *Peters v. North River Insurance Co. of Morristown, NJ*, 764 F.2d 306 (5th Cir. 1985).

Finally, the private Respondent asserts that the decedent's wife had no vested claim to death benefits prior to her husband's death and, consequently, she could not have been a "person entitled to compensation" for purposes of the forfeiture provisions of § 33(g). In explaining that certain contingencies could have occurred that would have prevented the claim for death benefits from ever vesting, Mrs. Yates asserts that she could have predeceased her husband, divorced him, or he could have died from unrelated causes. However, Mrs. Yates' argument fails to recognize that those same contingencies would have prevented her from ever making a claim for wrongful death against the third party defendants or the

Petitioners. Nevertheless, she was able to settle her *potential* claim prior to the death of her husband. In doing so, she assumed the position of a "person entitled to compensation" and accordingly, she should bear the responsibilities of that position, which would require her to obtain the employer's consent to the third party settlement. See *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992).

For the foregoing reasons, this Court should grant certiorari to resolve the conflict between the circuits regarding the § 33(g) issue.

2. Standing of the Director, OWCP

In the Petition for Writ of Certiorari, the Petitioners note the conflict between the Fourth and Fifth Circuits regarding whether the Director, OWCP, has standing to actively respond to an appeal in which it has no pecuniary interest. Mrs. Yates asserts that issue is not sufficiently important to merit certiorari, since the Court of Appeals for the Fifth Circuit resolved the issue in a footnote. However, numerous courts have been perplexed by this issue. *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 807, n.4 (3rd Cir. 1988). Furthermore, the Court of Appeals for the District of Columbia has stated as follows concerning the issue:

At the outset we acknowledge that no authority easily disposes of this motion. The statutory scheme and regulation upon which the DOWCP principally relies do not, in so many words, resolve this issue; the Supreme Court's statement on this point is also equivocal. The legislative history is unhelpful. Finally, Rule 15(a), if it applies at all, begs the question. Thus it is not surprising that the circuits have split almost evenly as to the proper role of the Director and Board in Section 921(c) proceedings.

Shahady v. Atlas Tile & Marble Co., 673 F.2d 479, 481-2 (D.C. Cir. 1982).

Consequently, the employer would assert that the issue of the Director's standing to respond is an important issue which has perplexed numerous circuits and compels final resolution by this Court.

The Director, OWCP, also asserts that the issue of its standing does not merit resolution by this Court, despite its admission that the Fifth Circuit's decision in the instant claim conflicts with a line of cases in the Fourth Circuit. (See Director's Brief, pp. 12-13.) In support of his position, the Director asserts that his standing is irrelevant where all issues on the merits are presented by the claimant and the employer. (See Brief, p. 13.) In support of his contention, the Director cites the cases of *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 807, n.4 (3rd Cir. 1988); *United States Department of Labor v. Triplett*, 494 U.S. 715, 719 (1990); and *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 305 (1983). However in *Curtis*, there was no objection to the standing of the Director; the issue was not fully briefed; and the Director appeared in large part on behalf of the petitioner, despite a lack of any financial interest in the case, contrary to this Court's recent decision in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, ___ U.S. ___, 115 S.Ct. 1278, 131 L.Ed. 2d 160 (1995).

The *Triplett* case is also inapplicable. It did not deal with the issue of the Director's right to appear as a respondent, since the Director appeared on the side of the petitioner. Secondly, *Triplett* did not involve an issue between an employer and employee. Instead, it was an issue between a committee on legal ethics and a plaintiff's attorney. Third, rather than making an automatic appearance as a respondent, as in the present case, the Director in *Triplett* intervened at the request of the lower court. Finally, *Triplett*, unlike the case at bar, involved an important governmental interest which the Director was

obliged to protect, since the lower court had found part of the implementing act unconstitutional.

The Director's reliance on the *Perini* case is also misplaced. In *Perini*, the Director was the sole petitioner, despite the fact that the government had no financial interest in the outcome of the case, which would today violate this Court's opinion in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, cited *supra*. Furthermore, the employer/respondent never objected to the Director's standing before the Court of Appeals, and the injured worker appeared as a respondent but argued in favor of the Director. 459 U.S. at 305.

The Director also asserts that consideration of his automatic standing as a respondent is not necessary in this Court since the Director could intervene in the case pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. See also *I.T.O. Corporation of Baltimore v. Benefits Review Board*, 542 F.2d 903, 909 (4th Cir. 1976). However, the mere fact that an entity could possibly intervene has no bearing on the issue of whether it should have been a party in the first place. Furthermore, allowing intervention pursuant to Rule 24(b) still requires some interest in the outcome of the case and a discretionary decision by the court which takes into consideration any undue delay or prejudice the intervention would cause the original parties. See Rule 24(b) of the Federal Rules of Civil Procedure. Consequently, absent a legitimate interest, federal agencies have often been denied a right to intervene. *E. I. du Pont de Nemours & Co. v. Lyles & Lang Construction Co.*, 219 F.2d 328 (4th Cir. 1955), cert. denied, 349 U.S. 956 (1955); *Industria E. Commerico De Minerios S. A. v. Nova Genuesis Societa*, 172 F.Supp. 569 (E.D. Va. 1959), 197 F.Supp. 699, aff'd, 310 F.2d 811 (4th Cir. 1962); *Jacobs v. Volney Felt Mills, Inc.*, 47 F.Supp. 493 (N.D. Ind. 1942). Furthermore, the courts have indicated a reluctance to allow intervention by the government in a private dispute where the private parties adequately address

the issues. *General Electric Co. v. Hygrade Sylvania Co.*, 45 F.Supp. 714 (S.D.N.Y. 1942); *Woburn Degreasing Co. v. Spencer Kellogg & Sons, Inc.*, 3 F.R.D. 7 (W.D.N.Y. 1943). In fact, this rationale has been used as a basis to deny standing to the Benefits Review Board in a case before the Court of Appeals arising under the LHWCA. *McCord v. Benefits Review Board*, 514 F.2d 198 (D.C. Cir. 1975); see also *Ingalls Shipbuilding, Div. Litton Systems, Inc. v. White*, 681 F.2d 275, 283 (5th Cir. 1982), *overruled on other grounds*, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir.) (*en banc*), *cert. denied*, 469 U.S. 818 (1984).

Finally, the Director asserts in its response brief that the Court of Appeals for the Fifth Circuit was correct in finding that Rule 15(a) of the Federal Rules of Appellate Procedure requires that the Director, on behalf of the agency, be automatically entitled to respondent status. Surely, Rule 15(a) does not create standing absent the Director being able to show that his statutory interests, as discussed in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, cited *supra*, are present in any case where he claims standing. Further, there is a split in the circuits on this issue. For example, the Court of Appeals for the District of Columbia holds that Rule 15(a) of the Federal Rules of Civil Procedure does not apply to the Director's standing in claims under the LHWCA, and instead, it applies only where the agency that made the decision is an active litigant. *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 484 (D.C. Cir. 1982).

For the foregoing reasons, and particularly because of the widespread conflict in the circuits on how to resolve the issue of the Director's standing as a respondent, the Petitioners herein would respectfully assert that certiorari should be granted on the issue regarding the standing of the Director as a respondent.

3. § 33(f)

The third issue on which Petitioners seek certiorari concerns § 33(f) of the LHWCA, 33 U.S.C. § 933(f). Petitioners assert that the plain language of § 33(f) allows them to be reimbursed from any net amount paid by the third party defendants. However, both Respondents assert that the plain language favors their position that only the amount recovered by the "person entitled to compensation" may be used to reduce the employer's liability, and that there is no split in the circuits on the issue. Section 33(f) provides, in pertinent part, that "... the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered *against such third person*." 33 U.S.C. § 933(f) (Emphasis added.)

The plain language of the statute merely requires that the "person entitled to compensation" institute the third party proceedings and that thereafter, the employer is entitled to recover the entire net amount recovered "against such third person." The employer is not limited to recovering only the net amount to be received by the "person entitled to compensation."

The Respondents' interpretation of § 33(f) would also be contrary to the purpose of § 33 of the LHWCA, which is to place full liability on the responsible third party and make the employer whole. *Peters v. North River Insurance Co. of Morristown, NJ*, 764 F.2d 306 (5th Cir. 1985). Because Mr. Yates died, it makes little sense to give his family greater rights and Ingalls lesser ones with respect to the third party recovery. This becomes clear when one considers that had Mr. Yates, the deceased employee and original claimant, lived through the third party settlements in issue, he would have had to reimburse Ingalls without being able to parcel the proceeds to his wife or children to avoid reimbursement of Ingalls' lien.

Finally, the Respondents' interpretation of § 33(f) would be contrary to long-standing case law holding that the employer's lien is inviolable. *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980); *Bartholomew v. CNG Producing Co.*, 862 F.2d 555 (5th Cir. 1989).

For the foregoing reasons, Petitioners would assert that certiorari should be granted to resolve the question as to the amount of the setoff to which the Petitioners are entitled pursuant to § 33(f) of the LHWCA.

4. Contractual Basis

The final ground upon which Petitioners seek certiorari is that the releases in the third party litigation themselves contractually obligated the widow to allow the employer to set off its liability by all net amounts received from the third party defendants, including amounts received by the non-dependent heirs-at-law. In her brief, the widow argues that this Court should not grant certiorari for review of factual determinations. However, it should be noted that it was the Court of Appeals for the Fifth Circuit which made the finding of fact that the releases did not "clearly and unambiguously" allow the employer a credit for all net amounts paid. Findings of fact should be made by the trial judge. Furthermore, those findings should be respected by the appellate courts. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 189 (5th Cir. 1992). In the case at bar, the trial judge weighed conflicting evidence and found an intent to allow the employer to set off its liability to the widow by all net amounts received from the third party defendants, including the amounts received by the non-dependent heirs-at-law. Accordingly, the Court of Appeals for the Fifth Circuit went beyond its appellate function when it substituted its judgment on the facts for that of the trial judge. See *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028 (1947). Also, since virtually identical releases have

been executed by thousands of plaintiffs who were allegedly exposed to asbestos with this employer alone, this Court's interpretation of the releases could potentially affect thousands of cases and vast sums of third party disbursements.

Secondly, the widow asserts that the contracts should be interpreted pursuant to state law. (See Brief of Widow at p. 18.) However, where they conflict, state law will be preempted by the Longshore Act. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987).

The widow also asserts that estoppel cannot be raised as a defense. In the instant claim, the widow provided documentation of third party settlements to the employer, which noted that the employer would be entitled to set off its liability for benefits by the full net amount paid by the third party defendant. Those documents clearly indicate that the Respondent acknowledged that Petitioners were entitled to set off the full net amount received from the third party defendant, including the amount received by non-dependent heirs-at-law.

Next, the widow asserts that the Petitioners cannot rely upon a contract to which it was not a party unless it can show that the contract was for its direct benefit. (See Widow's Brief at p. 19.) However, the Fifth Circuit has held that an employer and carrier can enforce an agreement between a claimant and a third party defendant requiring reimbursement of its lien. See *Speaks v. Trihora Lloyd P.T.*, 838 F.2d 1436 (5th Cir. 1988).

Finally, the widow asserts that §§ 15 and 16 of the LHWCA, which disallow waivers of compensation, would make the contracts in the instant claim invalid. However, the agreements in the instant claim were not between the employer and employee, as contemplated by §§ 15 and 16 of the Act. Instead, they were between the widow and the third party defendant. Finally, the Court of Appeals did not consider the applicability of §§ 15 and

16 to the instant claim and thus these arguments should not be considered on appeal by this Court.

CONCLUSION

For the foregoing reasons, Petitioners would request that this Honorable Court grant certiorari on all four issues.

Respectfully submitted,

RICHARD P. SALLOUM
(Counsel of Record)

PAUL B. HOWELL

FRANKE, RAINEY & SALLOUM, PLLC
Attorneys at Law

2605 Fourteenth Street

Post Office Box 460

Gulfport, MS 39502

601-868-7070

Counsel for Petitioners

WILLIAM J. POWERS, JR.

Vice President and General
Counsel

GEORGE M. SIMMERMAN, JR.

Assistant General Counsel

Ingalls Shipbuilding, Inc.

Post Office Box 149

Pascagoula, MS 39568-0149

601-935-3912

Of Counsel for Petitioners

May 1996